IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 5319 OF 1994
With
CIVIL APPLICATION NO.9865 OF 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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ASSOCIATION OF CABIN HOLDERS OF KARCHELIA - Petitioner(s)
Versus
STATE OF GUJARAT & ORS. - Respondent(s)

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Appearance :
MRS. VASAVDATTA BHATT for Petitioner(s).
MR. DIPEN DESAI, AGP for Respondent(s) : 1 - 2.
NONE for Respondent(s) : 3.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 29/08/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

Present is a Writ Application under Article-226

of the Constitution of India by an Association of cabin holders filed under the hands of the alleged Honorary Secretary, Pravinbhai Virchandbhai Patel. We do not know whether this Association is a registered Association or not, or whether it is a society registered under the Registration of Societies Act, or it is a simple group of persons, which has selected one person as an Honorary Secretary to look after their cases and causes.

2. By this Writ Application, the members of the petitioner-Association propose to challenge the notices of eviction issued by the respondent-Authorities of the Road and Building Department of the Government of Gujarat, the action of the authorities in demolishing the constructions raised by the members of the petitioner-Association and the alleged demolition of hutments and eviction of slum dwellers and constitutional validity of Section-202 of the Bombay Land Revenue Code.

2.1 It is submitted by the petitioners that the members of the Association are carrying on petty trade through lorries (movable carts) and cabins at Village-Karchelia, Taluka:Mahuva, District:Surat. It is alleged that the Association was set up on 5th April, 1992 under the Presidentship of Shri Kantilal Nathubhai Maisuria and Pravinbhai Patel, the signatory of this Writ Application,

was appointed as the Honourary General Secretary. The petition nowhere says that the Association was registered under any provisions of law.

2.2 According to the petitioners, the highway passing through the Village-Karchelia, on its abutments, is surrounded by residential houses, cabins and kutcha slums. The local Officer of the Road and Building Department issued them notices for removal of constructions made by them. The petitioners submit that number of social workers had taken up the matter with the Road and Building Department to secure alternative accommodation for the members of the Association with a view to ensure that no cabins are removed before the cabin holders are given alternative accommodation. It is submitted that the Department was required to take steps for building a shopping centre at the place selected for the purpose by the Department, plans and estimates were prepared and it was observed that the construction would need an expenditure of Rs.14,12,250/-. The cabin holders on their part collected more than Rs.1,30,000/- in the first instance and deposited the same with the Surat District Cooperative Bank, Karchelia. According to the petitioners, notices dated 8th February, 1994 were illegal and bad because they were not taking into consideration the oral assurance given by the authorities and the plans

and estimates, which were prepared for raising a shopping complex.

2.3 It is further submitted that upon receipt of the notices contained in Annexure-A/1 to A/19, the cabin holders and the office bearers of the Association met the Sarpanch of the Gram Panchayat and the Member of Parliament, who, in turn, met the Road and Building Authorities. The members of the Association were given to understand, as alleged, that the petitioners can approach the Collector, District:Surat, for appropriate instructions. Thereafter, the office bearers met the Collector. It is the say of the petitioners that the Collector orally assured them that eviction proceedings would not be taken against them.

2.4 According to the petitioners, to their shock and surprise, on 16th and 17th March, 1994, the Road and Building Department's Officers came to the spot with bulldozers and trucks to bulldoze the constructions. It is submitted that 22 hutments and 105 cabins/lorries were demolished forcibly in the said two days. The submission is that this action was taken without any further notice or any opportunity of hearing to the petitioners. In the petition, it is submitted that the action taken by the authorities is bad, Section-202 of the Bombay Land

Revenue Code is *ultra vires* the Constitution and the action under the said Section-202 is *per se* illegal and void *ab initio*. It is further submitted that the petitioners have been discriminated in comparison to others and, therefore, under the circumstances, such action could not be taken by the authorities. It is prayed in the petition that Section-202 of the Bombay Land Revenue Code be declared *ultra vires*, the notices issued to the petitioners (Annexure A/1 to A/19) be declared illegal, the respondents be asked to restore the position of the property as those were existing prior to their demolition, the authorities be injuncted by this Court from interfering or disturbing the possession of the slum dwellers and proper compensation be ordered to be paid in favour of the members of the petitioner-Association.

3. During the course of the arguments, it was vehemently contended that if the petitioners are to be uprooted and evicted, then, it is the obligation upon the Government and its authorities to provide some alternative accommodation.

4. We must immediately record that in the Writ Application, no foundation has been laid for this relief, nor any relief has been claimed. It was during the course

of the arguments that an endeavour was made by the learned Counsel for the petitioners that such prayer was made and the reliefs were claimed.

5. The respondents, in their return, have submitted that the petitioners have made encroachment upon the State Highway, they have no authority under law to stay there and if for some reason or the other, they had stayed there for some time or long, then, their stay would not create any rights in their favour because any encroachment upon the Highway or the road or the thoroughfare would not ripen into any right in favour of such trespasser or the wrongdoer. It is also submitted by the respondent's Counsel that construction has been raised in the ribbon development area and such an action on the part of the petitioners' members is absolutely bad. According to him, from the center of the road upto a particular extent, no construction is permissible and if such construction is raised, then, such construction is not only illegal but tantamounts to criminal action of trespass/encroachment. It is also submitted that the wrongdoer would not be entitled to claim equity on the ground that he has enjoyed the fruits of his wrong action, therefore, such wrong action if is required to be corrected, then, the wrongdoer must be placed on a higher pedestal.

6. The petitioners have made a submission that they are poor people and are earning their livelihood from these places.

7. We are unable to agree with it because the list, Annexure-D to the Writ Application, shows the business and vocation of the members of the petitioner-Association. From the said list, it would appear that the members of the petitioner-Association are running their permanent shops, they are running their shop of chemist, dispensary, shop of ready made garments, shop of electrical goods, machinery stores and what not. If such persons are taken to be downtrodden and the people belonging to the lower strata of the society, then, no person can ever be said to be living in the higher strata of the society. If the grassroot is so strong, then, we do not need trees.

8. Undisputedly, the petitioners have not been allotted any land, nor have any authority of law to stay in the kutcha/pacca construction raised by them. They are rank trespassers who have made encroachment by raising construction on the side flanks of the road within the ribbon development area. It cannot be disputed that the road does not mean *pacca* construction either with cement

or concrete or by metal or by bituminous, but, the side flanks, which are on the sides of the roads, which may even be *kutcha* would also be parts of the roads. The roads are not made for stay, rather permanent stay, the roads are constructed to provide civic amenities for the convenience of the general public. Of late, it is to be seen that one man would take a risk by placing some material or some concrete and thereafter, he would be followed by others. Serious illegal activities in making encroachment would go on and ultimately, the Association like the present, which we can describe as the rampant wrongdoer, under its authority, would appear before another Officer of the Government and would try to intimidate upon him and would also seek political protection. In the present case, the Members of Parliament and the Members of Legislative Assembly were readily available to the wrongdoers when they went to the higher Officers and pleaded the cases of the petitioner's members that no action should be taken against them and if they are to be removed, some alternative accommodation must be provided to them. It is most unfortunate that to protect the vote bank, the politicians are committing injustice with the people who are law abiding citizens. Democracy does not mean that one is entitled to exercise some rights which the law does not confer upon him, democracy also does not mean that a group of wrongdoers

would stand up and with their brutal and thumping majority, would compel the Officers to surrender or submit before them and accept their illegal demands. Democracy is a system of the Government which is of the public, by the public and for the public. All the wrongdoers, who are less in number, if are allowed to rule the law or govern the Government, then, that would not be the liberty, but, it would prove to be the death-knell in the democracy's coffin.

9. In the present matter, without any authority of law, constructions were raised by the members of the petitioner-Association, they had no authority, they had no allotment, they had no settlement, nor they had any oral permission, nor any political patronage at the time when they entered on this land. Assuming for a minute that they had some political patronage at the time of their illegal entry upon the land, then also, the said political patronage would not protect the illegal act committed by the members of the petitioner-Association. The politics is not on the roads as the encroachment, but, the politicians find its room in the Parliament and the Legislative Assembly. Such illegal assurance by the politicians that everything would be settled in favour of the slum dwellers, wrongdoers, trespassers or encroachers may or may not be a misconduct on their part under the

provisions of the Representation of the People Act, but, any such assurance would be illegal if it does not have any legal foundation to stand.

10. Section-202 of the Bombay Land Revenue Code by no stretch of imagination can be held to be *ultra vires* the Constitution. The learned Counsel for the petitioner ultimately submitted that she be allowed to withdraw the challenge to the said provisions of law.

11. At this stage, though we are little curt, we must observe that of late, a practice has developed that to find an appropriate Bench or to avoid an inconvenient Bench, a challenge to the *vires* of the provisions of law is thrown just for the sake of nothing and ultimately, some interim orders are obtained and when the matter comes up for final hearing, the learned Counsel for the petitioners at the threshold would submit that they be allowed to withdraw the challenge. In such a case, in our opinion, heavy costs must be imposed with a further direction of dismissal of the matter.

12. In the present matter, the petition was filed in the year 1994. Twelve years and more have passed and the petitioner's members are still enjoying the possession and the State Authorities are not in a

position to take any action. True it is, that uncertainty and delay are certain in the Courts, but, that does not mean that every delay should inure to the benefits of the person who has some order in his favour.

13. The petitioners do not have any right under any law except making a submission that they are entitled for their rehabilitation or resettlement at some place. If resettlement or rehabilitation proceedings are taken in favour of these persons, then, it would be adding premium upon the wrong committed by such persons. Would not the law abiding citizen feel bad that though, all through, he had been observing law, he could not seek any benefits under the strong clutches of law, while on the other hand, a wrongdoer, whose action was in the teeth of law, is getting some benefits and his illegal action is ripening in some rights in favour of the wrongdoer. In our opinion, an order for settlement or rehabilitation of such persons can never be made.

14. It is also to be seen that all such persons, who make illegal constructions, raise their ground level to some extent and thereafter, raise a platform and thereafter, they make a ramp from their premises upto the road or part of the road. The rain water and used water flows from their constructions towards the road side, the

side flanks, which ordinarily are supposed to be lower to the main road, become higher and ultimately, the water starts logging up on the *pacca* streets. When these streets, whether in the township or outside, by this action, are converted into pacca sewage line, then, everybody would again get up and start shouting that the State Government or the Panchayat or the Municipality or the Corporation are not alive to their duties and are not doing anything for the public at large. Anybody with open eyes if takes a round of this township itself, then, he would find that from the main road or the *pacca* road or the street, the houses situated on the side have higher ground level. We are not talking of the higher plinth level, but, we are talking of the higher ground level. The height of the ground level may be between 8 Inches x 1½ Ft. Everything would flow from those houses, bungalows or the societies towards the main road, `*kutcha nalies*' (earthern sewage system) are not to be seen anywhere. Everybody has either closed that system by raising some construction or by putting slab over it. The rain water, which was to flow from this sewage system, is now to collect and log on the main roads. Water finds its own way when it flows from the higher to the lower level, but, in the meanwhile, it causes havoc. Water logging is not a problem simpliciter, but, has become a menace.

15. From the higher ground level, to connect the building/tenement to the main road, every building owner would raise a *kutcha* ramp (made by putting earth), such ramp would have a slope towards the main road, then such person would make *pacca* construction of cement and concrete or other material to connect the main road with the gate of the building/house. This construction in itself, according to us, is on the land belonging to the State Government or the local authority. This construction is a permanent construction, but, unfortunately, nobody takes an action. A person is entitled to have his ground floor level as he wants, but, the law does not give him an authority to raise *kutcha/pacca* ramp outside the house in the area situated in between the road and his house. When such construction is made, then, such construction is not only illegal, but, it adversely affects free flow of water and free flow of traffic. The entire traffic has to travel on the roads only because the side ramps on both the sides are covered with the encroachments made by the building owners. It is a permanent problem faced by the entire civilised society under the hands of those who claim themselves to be much better and civilised. When such an action is taken by the building owners, then, an immediate action should be taken by the local authorities for demolition of such ramps and for construction of

earthern sewage system so that the road level goes higher at least by 6 x 18 inches, with a slope more towards the house, permitting the water not to log upon the main roads.

16. We are sorry to say that almost every township is clustered with such illegal ramps and closure of the sewage system. We would remind the authorities of the local self-Government, including the Municipalities, Municipal Corporations, Panchayats, Urban Development Authorities, and such that they are obliged to take action for removal of such illegal construction so that everybody comes under the rule of law and thumb rule does not prevail anywhere.

17. So far as the question of discrimination is concerned, we must observe that if an action is not taken as a reaction to some other illegal action, then, that would not mean that everybody taking similar illegal action would be protected unless legal action is taken against the earlier encroachers or wrongdoers or against all of them simultaneously. A wrong, if is not remedied by the authorities, would not sow the seeds in favour of all others to enjoy the fruits of the wrong.

18. One could understand that in a given case, the

plea was that if a person who has been allotted the land is not being evicted, then, the other person, who is also in legal occupation, should not be evicted. The argument that because action is not being taken against other wrongdoer, no action should be taken against any wrongdoer if is accepted, then, it may lead to anarchy and no Government or Competent Authority, armed with the provisions of law, would be in position to take action against any wrongdoer.

19. The Supreme Court has been repeatedly observing that the question of comparison in form of discrimination should not be allowed to be raised in case the wrongdoer is relying upon the illegal action taken by another wrongdoer. What is wrong cannot be allowed to stand, nor it can be observed to allow the later wrong. In the matter of ***National Council for Teacher Education & Anr. vs. Committee of Management & Ors.***, [***(2006) 4 S.C.C. 65***], the Supreme Court has observed that the concept of Article-14 carries a positive concept. Only because some illegalities had been committed by the Council in respect of another institution, the same may not by itself be a ground for perpetrating the illegality.

In the matter of ***Vikrama Shama Shetty vs. State of Maharashtra & Ors.***, [***2006 AIR SCW 3877***], the Supreme

Court has observed as under:

> *"As highlighted by learned counsel for the appellants, even if it is accepted that there was any improper permission, that may render such permissions vulnerable so far as 32 vessels are concerned. But it cannot come to the aid of respondents. It is not necessary to deal with that aspect because two wrongs do not make one right. A party cannot claim that since something wrong has been done in another case; direction should be given for doing another wrong. It would not be setting a wrong right, but would be perpetrating another wrong. In such matters there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution of India, 1950 (in short `the Constitution') cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs at par. Even if hypothetically it is accepted that wrong has been committed on some other cases by introducing a concept of negative equality respondents cannot strengthen their case. They have to establish strength of their case on some other basis and not by claiming negative equality. (See Union of India and Anr. v. International Trading Co. and Anr. (2003 (5) SCC 435)."*

20. We dismiss the petition with costs of

Rs.10,000/- to be paid by the petitioner-Association to the State Government. We also give an opportunity and liberty to the Government Officers to take appropriate action against all wrongdoers either for recovering the compensation or for prosecuting them. We further hereby direct the State Government that when they had been so vigilant in taking action against the petitioner's members, then, they must be vigilant enough in taking action against other wrongdoers. We further direct that let a copy of this order be sent to the Chief Secretary for its onward circulation to the Corporations, Municipalities, Panchayats, Urban Development Authorities and such other authorities, who have to take action against the wrongdoers for initiating action, so that the rule of law is established and people are made to understand that the wrong does not pay but one has to pay for the wrong.

It is, however, made clear that the above referred directions and directions to the local authorities for removal of the encroachment are confined to the encroachments made on the roads or on the road flanks which is the property of the Government or of the local body/authority. These observations and directions do not relate to any illegal construction made within a plot or area belonging to the private person because in

that case, the local authorities would be entitled to take personal action against such wrongdoer. It is also made clear that this direction is not to run contrary to the directions issued by the Apex Court which related to religious monuments/religious places.

Ad interim relief granted earlier is vacated. Rule is discharged. Consequently, Civil Application No.9865 of 2000 is allowed.

[***R.S.Garg, J.***]

[***M. R. Shah, J.***]

*kamlesh**